

April 25, 2018

## FREEDOM OF INFORMATION ACT REQUEST

*Via FOIA Online*

Freedom of Information Officer  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW (2822T)  
Washington, DC 20460

### **Re: FOIA request re. EPA FOIA Trainings**

Dear EPA FOIA Officer:

This is a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, submitted on behalf of Food & Water Watch (FWW). This request seeks records related to EPA actions taken to comply with the March 24, 2017 settlement agreement in *American Farm Bureau Federation v. Environmental Protection Agency* 836 F.3d 963 (8<sup>th</sup> Cir. 2017) (“the Settlement”). The *American Farm Bureau* court held that some information about livestock operations may be appropriately withheld under FOIA Exemption 6. *Id* at 964. Pursuant to the Settlement of this case, EPA was required to train certain managers and FOIA officers on how to address FOIA Exemption 6, the federal Privacy Act, and other privacy issues. Settlement at 4.

FWW is a national, non-profit, membership organization dedicated to healthy food and clean water for all. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to stand up to corporations that put profits before people, and advocate for a democracy that improves peoples’ lives and protects our environment. FWW has an interest in the way EPA trains its employees to understand their obligations under FOIA. FOIA is an important governmental transparency tool that FWW regularly uses to educate the public on government activities, with an emphasis on EPA activities related to concentrated animal feeding operations (CAFOs) and industrial livestock operation pollution. The records requested will inform FWW, similar nonprofits, and the public on how EPA complied with the Settlement and is responding to relevant FOIA requests since the settlement.

### **Records Requested**

Pursuant to FOIA, FWW requests the following records, from March 24, 2017 to the present:

- Any and all guidance documents, training materials, PowerPoint presentations, memoranda, communications, or instructions related to the Settlement.
- Any and all schedules of meetings between EPA and the American Farm Bureau Federation, National Cattlemen’s Beef Association, U.S. Poultry and Egg Association, National Pork Producers Council, or other agricultural industry groups, related to the Settlement or actions taken to comply with the Settlement, and any minutes, notes, attendance lists, communications, or other records related to those meetings.
- Any and all communications between EPA and representatives from the American Farm Bureau Federation, National Cattlemen’s Beef Association, U.S. Poultry and Egg

Association, National Pork Producers Council, or other agricultural industry groups, related to the Settlement or actions taken to comply with the Settlement.

This request applies to all such records in any form, including (without limit) correspondence sent or received, telephone conversation notes, analyses, agreements, contracts, e-mail messages, and electronic files the release of which is not expressly prohibited by law. It also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement, include any information not contained in the original record. Additionally, this request is not meant to be exclusive of other records that, though not specifically requested, would have a reasonable relationship to the subject matter of this request. This request does not include any records that EPA currently maintains on its website.

To save resources and mailing expense, we request electronic copies of these documents whenever possible. We also request you disclose requested records at the time they become available to you instead of waiting to compile all of the requested records.

### **Claims of Exemption from Disclosure**

If you regard any requested records or portions of records as exempt from disclosure under FOIA, we ask that you please exercise your discretion to disclose them nonetheless. After careful review of the purpose of determining whether any of the information is exempt from disclosure, please provide any reasonably segregable non-exempt portion of exempt records, as FOIA requires. Should you elect to invoke an exemption to FOIA, please provide the required full or partial denial letter and sufficient information to appeal the denial.

### **Fee Waiver Request**

FWW requests that you waive any applicable fees for this request because disclosure is in the public interest. Disclosure of the information we request will “likely contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(1). FOIA carries a presumption of disclosure, and the fee waiver was designed specifically to allow nonprofit, public interest groups, such as FWW, access to government documents without the payment of fees. The statute is to be liberally construed in favor of waivers for noncommercial requesters. See *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it is ‘liberally construed in favor of waivers for noncommercial requesters’”). As explained below, FWW satisfies the criteria for a fee waiver established in FOIA, described as a multi-factor test in EPA’s implementing regulations, 40 C.F.R. § 2.107(1).

#### **Requirement 1: Disclosure is likely to contribute significantly to the public understanding of the operations or activities of the government**

*Factor 1: The subject matter of the requested documents concerns operations or activities of the federal government*

The subject of the records FWW requests clearly concerns “the operations or activities of the government.” 40 C.F.R. § 2.107(I)(2)(i). We request information regarding how EPA trains its staff to “understand their obligations under FOIA and the Privacy Act” and how it responds to

certain FOIA requests. Settlement at 4. How a federal agency responds to requests made pursuant to a federal statute is a “direct and clear” operation of the federal government. 40 C.F.R. § 2.107(I)(2)(i).

*Factor 2: The disclosure is “likely to contribute” to understanding of federal government operations or activities*

Disclosed information must be “meaningfully informative about government operations or activities in order to be ‘likely to contribute’ to an increased public understanding of those operations or activities.” 40 C.F.R. § 2.107(I)(2)(ii). EPA regulations further clarify that “[t]he disclosure of information that already is in the public domain . . . would not be likely to contribute to such understanding when nothing new would be added to the public’s understanding.” 40 C.F.R. § 2.107(I)(2)(ii). That is clearly not the case here, because the information we request is not already in the public domain, and therefore its disclosure would likely contribute to an understanding of how EPA responds to certain FOIA requests involving CAFO information. The Settlement required EPA to train its managers regarding their obligations under FOIA and the Privacy Act. Because EPA has not published its training materials or other information related to its actions to comply with the Settlement since it was finalized, the public does not know what EPA has done to train its staff, what CAFO information EPA is most likely to withhold, or what its rationale was for the approach it has adopted in applying privacy laws and exemptions. Through dissemination of the requested materials the public will gain “meaningfully informative” information that is not “already . . . in the public domain.” *Id.*

*Factor 3: The disclosure will contribute to “public understanding” of EPA’s operations and activities*

The records we request will contribute to the “public understanding” of EPA’s actions to comply with a federal settlement and its impacts on access to CAFO and related information. 40 C.F.R. § 2.107(I)(2)(iii). In determining whether the disclosure of requested information will contribute significantly to “public understanding,” a guiding test is “whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 815 (2d Cir. 1994). Additionally, FOIA officers will consider “[a] requester’s expertise in the subject area and ability and intention to effectively convey information to the public.” 40 C.F.R. § 2.107(I)(2)(iii).

FWW has significant expertise in the relevant subject area. FWW is a membership organization with a staff of approximately 100, including researchers, organizers, attorneys, and communications professionals. FWW works extensively with public policy and government accountability as well as CAFO pollution and environmental issues. Our staff regularly analyzes government data and records, including FOIA records, and uses this information to write, speak, and advocate to the media, decision makers, and the public about government transparency, EPA oversight of CAFO operations and other industrial livestock operation pollution, and access to CAFO information. FWW frequently uses FOIA records and other public data to draft and issue policy-based reports on issues of public interest, including CAFO pollution, the locations of livestock operations, and EPA transparency. *See, e.g.*, <https://www.foodandwaterwatch.org/insight/factory-farm-nation-2015-edition>, <https://www.factoryfarmmap.org/>, <https://www.foodandwaterwatch.org/news/dozens-advocacy->

[groups-challenge-epa-factory-farm-pollution](https://www.foodandwaterwatch.org/problems/factory-farming-food-safety), <https://www.foodandwaterwatch.org/problems/factory-farming-food-safety>. FWW is therefore prepared to analyze the requested information and present it to the public in a way that will most effectively increase public understanding of the subject.

FWW also has the intention and ability to effectively disseminate the information obtained from the disclosed records such that it reaches a broad audience of interested members of the public through diverse and highly effective channels, including: traditional media outlets nationwide; FWW's website, Facebook page, other social media outlets, and newsletter; press releases; blog posts on websites such as the Huffington Post; presentations at community meetings and conferences attended by rural citizens impacted by CAFO pollution, environmental attorneys and advocates, and other interested members of the public; and emails to some or all of FWW's hundreds of thousands of supporters. FWW's work on EPA regulation of CAFOs has garnered significant media attention, including coverage in Politico, Inside EPA, Bloomberg, Greenwire, the Oregonian, and other state and local outlets across the country, demonstrating FWW's ability to reach interested members of the public with the requested information.

Furthermore, FWW will also make the information available to national, regional, state, and local organizations with members and supporters interested in the subject. FWW commonly works with organizations that do CAFO research and litigation such as Earthjustice, the Socially Responsible Agricultural Project, the Center for Food Safety, the Center for Biological Diversity, Public Justice, the Waterkeeper Alliance, and the Humane Society of the United States, which cumulatively have millions of members nationwide.

Due to our demonstrated ability to effectively analyze EPA records and disseminate information to interested members of the public directly and through the media, and our relationships with other organizations that can reach a broad audience of persons interested in the information in the requested records, FWW is uniquely able to contribute to "public understanding" and meet this fee waiver criterion.

*Factor 4: The disclosure is likely to contribute "significantly" to public understanding of EPA activities*

The public understanding of EPA's actions related to FOIA privacy exemptions, the Privacy Act, and withholding of CAFO information "as compared to the level of public understanding existing prior to disclosure, [will] be enhanced by the disclosure to a significant extent." 40 C.F.R. § 2.107(l)(2)(iv). The information requested will shed light on how EPA interprets its obligations under the Settlement, because the records include the very training materials and related records that spell out EPA's actions taken and interpretations adopted pursuant to the Settlement, as well as communications that will shed light on EPA's rationale and considerations in taking those steps to comply.

The public currently knows very little about how and when EPA redacts or withholds CAFO and similar records or the basis for those withholdings or redactions. As part of the Settlement, EPA agreed to conduct training to ensure its managers understood their obligations under FOIA and the Privacy Act. Settlement at 4. However, neither the Eighth Circuit opinion nor the Settlement dictated EPA's specific interpretations of the scope of Exemption 6 or Privacy Act under various circumstances. FWW's dissemination of the information will surely enhance the public

understanding by a significant extent, as compared to current public understanding, because the requested information is currently completely unavailable to the public.

The training materials and related records are not currently available on EPA's website or elsewhere on the Internet, and have not been previously published by the EPA. Disclosure of this information will enhance understanding because it will inform both FOIA requesters and business owners of the way EPA is now applying privacy exemptions pursuant to FOIA.

**Requirement 2: Disclosure is not primarily in the commercial interest of the Requester**

*Factor 1: The Requester has no commercial interest in obtaining the information*

The second element of the fee waiver analysis addresses the requester's "commercial interest" in the information. Two factors must be addressed when determining whether the information requested is "primarily in the commercial interest of the requester." 40 C.F.R. § 2.107(I)(1). The first factor is whether the requester has a commercial interest that would be furthered by the requested disclosure. 40 C.F.R. § 2.107(I)(3)(i). FWW does not have "commercial interest that would be furthered by the requested disclosure." 40 CFR § 2.107(I)(3)(i). As a nonprofit organization, FWW has no commercial, trade, or profit interest in the requested materials. FWW will not be paid for the information or the dissemination of the information requested. The records will be disseminated only to inform the public; it will not be used for or result in commercial gain.

*Factor 2: Disclosure is not "primarily in the commercial interest of the requester"*

The second factor of the commercial interest consideration hinges on the primary interest in the disclosure and requires a weighing of any commercial interest against the public interest in disclosure. 40 C.F.R. § 2.107(I)(3)(ii). There is a great public interest in disclosure of the requested records. The requested records will inform the public, including future FOIA requesters, on how privacy exemptions will be applied to information about livestock operations, CAFOs, and related records. Thus, even if FWW did have some "commercial" interest in the documents requested, a complete fee waiver would still be required because our "primary" interest in the material is to inform the public about the operations and activities of the government. Therefore, this is a situation in which the "public interest is greater in magnitude than that of any identified commercial interest" of the requester. *Id.* Of course in this case, even if the public interest were not so significant, it would clearly outweigh the nonexistent commercial interest, such that the disclosure is clearly primarily in the public interest. Therefore, the "disclosure of the information . . . is not primarily in the commercial interest of" FWW and a fee waiver is appropriate. 5 U.S.C. § 552(a)(4)(A)(iii).

**Conclusion**

Based on the above analysis, the requested records bear directly on the operations and activities of the EPA and will significantly contribute to the broad public understanding of EPA's actions to comply with the Settlement and its training protocols for withholding information from the public. Furthermore, disclosure will serve no commercial interest for FWW. Under these circumstances, FWW satisfies the criteria for a fee waiver. If for some reason EPA denies the fee waiver in whole or in part, please contact me before incurring any costs related to this request. If

EPA does not fully grant the fee waiver and costs are incurred prior to contacting me, FWW will not be responsible for those costs. We reserve the right to appeal any decision to wholly or partially deny the fee waiver request in this matter.

If you have any questions or if you require further information to identify the requested records or rule on the fee waiver request, please contact me at (202) 683-2457 or [theinzen@fwwatch.org](mailto:theinzen@fwwatch.org).

Thank you in advance for your prompt reply.

Sincerely,



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